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# Harnessing the Link between Constitutional Law and Tax Law through Constitutionality Reviews on the New International Tax Order

*Adrianto Dwi Nugroho\**

## 15.1 Introduction

The international tax law literature has sought for the enforcement of the new international tax order, which placed the Base Erosion and Profits Shifting (BEPS) project as its notable trait. The project presupposed that the international tax framework at that time was unable to adapt to the business developments inherent in the integration of national economies and markets.<sup>1</sup>

Meanwhile, Lepsius<sup>2</sup> studies showed that within the last 20 years, the case law of the German Federal Constitutional Court on the protection of basic rights has been largely influenced by tax law. The reason consists in the fact that taxes – in particular, direct taxes – have become tools for the most frequent and proliferated infringements on individuals' basic rights, particularly the right to property.<sup>3</sup>

These infringements are of unprecedented risks to occur especially within the new international tax order, which culminates in the conclusion of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as the MLI).<sup>4</sup> By adopting its norms into existing Double Tax Convention (DTC), the MLI has found its way to penetrate into domestic tax laws. Proportionate tax laws are necessary to ensure that the intrusion of states into the private spheres of individuals is justified.<sup>5</sup>

Profound norm-reviewing powers rest within the judicial power, particularly the constitutional courts. Their scrutiny is necessary because the value of the MLI lies within its swift implementation in eliminating aggressive tax planning. Consequently, conformity of the norms with the constitutions is relatively left out from discussions. In order to prevent ultra vires taxes, such conformity should be verified through constitutionality review.

If a (ratified) MLI is declared in line with the Constitution, then the government's decision to adopt the MLI may actually improve taxpayers' compliance. On the contrary, when the MLI is declared

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<sup>1</sup> OECD, *BEPS Project Explanatory Statement: 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project*, (OECD 2016), Introduction [1].

<sup>2</sup> Oliver Lepsius, 'Constitutional reviews of tax laws and the unconstitutionality of the German Inheritance Tax', (2015) 16 German Law Journal 1191, 1192.

<sup>3</sup> Oliver Lepsius, *supra* 2, 1192.

<sup>4</sup> OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (OECD November 2016).

<sup>5</sup> Oliver Lepsius, *supra* 2, 1192.

unconstitutional, then the government will have a strong legal basis to amend its commitment to the MLI. The extent to which the review takes place, though, is dependent upon the legal traditions and the type of basic rights vested in the constitutions. A basic right protected in one state might not enjoy the same protection in another; likewise, a constitutional dispute in one state might fall short of attaining a *locus standi* in another. Also, the MLI may be declared unconstitutional in one state and constitutional in another. Thus, within the effort to harness the link between constitutional law and tax law, what are the requirements for an effective constitutionality review on the (ratified) MLI?

## 15.2 Expounding the MLI as Object of Constitutionality Review

As an international law instrument, the MLI is bound by the provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT). Thus, it is subject to provisions on the application of successive treaties concerning the same subject matter laid down in Article 30 of the VCLT, and the general rule on the amendment of treaties governed in Article 39 of the VCLT. The Organization for Economic Co-operation and Development (OECD) states:<sup>6</sup>

The Convention operates to modify tax treaties between two or more Parties to the Convention. It will not function in the same way as an *amending* protocol to a single existing treaty, which would directly amend the text of the Covered Tax Agreement; instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.

Contextually, the international tax law is governed primarily by a network of DTC comprising of circa 3,500 bilateral conventions,<sup>7</sup> which derive their structures from model tax conventions developed by the OECD, the UN, or individual states (e.g. the U.S. Model Convention). These model conventions were at the heart of the BEPS project, the action plans of which were designed to close many loopholes found within the models on which taxpayers had been taking advantage. This effort was deemed to be inefficient as it meant that each and every existing DTC must have been amended. Thus, the MLI form was chosen, with the purview that its signatories may modify implementation of the DTC concluded among them simply by identifying a DTC as a ‘Covered Tax Agreement’.

Being a set of norms, developed by an intergovernmental body such as the OECD, the MLI may be able to achieve its purposes to the extent that the representation of different states’ interests and traditions is sustained. In order to maintain and increase participation, the MLI provisions were formulated in a method that enable states to accept for or reserve against varieties of measures. Thus, states may be selective with regard to the MLI provisions they wish to adopt.

### 15.2.1 Domestic Status of the MLI

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<sup>6</sup> OECD, ‘Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting,’ [13].

<sup>7</sup> OECD, *supra* 1, [20].

In order for the MLI to be able to become an object of constitutionality review, it must initially attain domestic status. Conceptually, the domestic status of an international convention consists of domestic validity, domestic applicability, and rank.<sup>8</sup> These matters and the general methods of transposition of the conventions into domestic law are prescribed in the domestic law itself.

Traditionally, the validity of international conventions is influenced by the monist and dualist traditions. Within the former, provisions of an international convention are converted into domestic law without a due legislative act, whereas in the latter, obligations arising from international conventions must be implemented into domestic law through legislative act.<sup>9</sup> Referring to the implementation of human right conventions and EU law, Viță<sup>10</sup> reiterated that the monist-dualist concept has, however, become less relevant in the contemporary acceptance of international conventions.

When validity is determined by a legislative act, the hierarchical order of the law (i.e. a Law or Bylaw) by which an international convention will have its domestic validity may affect the eligibility of the convention to be an object of constitutionality review. In Indonesia, a plea for constitutionality review can only be filed against a Law, which is jointly enacted by the president and parliament.<sup>11</sup> Meanwhile, the Law on International Convention governs that DTC signed by Indonesia falls within the category of convention which is ratified by a presidential regulation.<sup>12</sup>

In any case, the attainment of domestic validity does not render an international convention applicable domestically. Sohn<sup>13</sup> submitted that the relationship between domestic validity and domestic applicability of an international convention should be construed as that the former is a prerequisite in establishing the latter. This effectively rules out any interpretation by which an international convention could automatically acquire domestic validity if it has an expressed domestic applicability in its provisions.<sup>14</sup>

The domestic applicability of the MLI must be placed against the peculiar background of the parallel nature of DTC and the MLI (i.e. the nature by which the MLI does not amend the texts of DTC, but rather affects the application of those texts). From a state's perspective, the selected MLI provisions

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<sup>8</sup> Yuji Iwasawa, 'The doctrine of self-executing treaties in the United States: a critical analysis', 26 Virginia Journal of International Law 627 in Ji Hyun Sohn, 'The relationship between WTO Law and national law: critical analysis on jurisprudence of Korean national courts', (2007) 2 Korea U. Law Review 138, 153.

<sup>9</sup> David Sloss, 'Non-self executing treaties: exposing a constitutional fallacy', (2002) 36 University of California Davis Law Review 3, 9.

<sup>10</sup> Viorica Viță, 'The Romanian Constitutional Court and the principle of primacy: to refer or not to refer', (2015) 16 German Law Journal 1623, 1630.

<sup>11</sup> Law 24 of 2003 on the Constitutional Court as amended lastly by Act 4 of 2014, Art. 10(1).

<sup>12</sup> Law 24 of 2000 on International Convention, Art. 10 *juncto* Art. 11(1).

<sup>13</sup> Ji Hyun Sohn, *supra* 8, 153.

<sup>14</sup> *Ibid.* Sohn argued that this was the case with the U.S. 'self-executing treaties'.

are directly applicable to a number of covered DTC, the selection of which is also at the discretion of each state and its treaty partners. Thus, the MLI has only indirect applicability to domestic tax law. In turn, the covered DTC has direct applicability on domestic tax laws, particularly the income tax law. This view must be taken notwithstanding the parallel nature of both instruments, for it otherwise would render the MLI domestically inapplicable, at all.

In terms of constitutional law, the parallel nature of DTC and the MLI raises a challenge as to which of the ratifying laws, of the – DTC or of the MLI – could become object of constitutionality review. Constitutionality review whether as an integral part of a constitutional complaint or as separate procedure, requires identification of the specific provision of the law to which the review will take place. Since the MLI only acquires indirect domestic applicability, a constitutional complaint against the application of an MLI provision could not completely disregard the DTC provision because its application is affected by the MLI. Thus, two different laws are affected.

Even if an international convention has acquired both domestic validity and domestic applicability, the rank which the convention acquires within a state's constitutional realm has brought about another challenge towards subjecting the MLI to constitutionality review. The issue stems from, again, the monist-dualist dichotomy, specifically concerning its use in defining the relationship between domestic and international laws. A monist state considers domestic and international laws belonging to the same legal order, whereas a dualist state draws a distinction between the laws by which the domestic legal status of the latter laws is to be determined by the former laws.<sup>15</sup> The dichotomy fails to solve the issue of which of the two acquires higher rank.

This brings the discussion to the primacy [of EU law] principle. The principle confers that '(...) the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States'.<sup>16</sup> As an EU principle, the primacy principle enjoys – or suffers from – different level of acceptance by constitutional courts in EU Member States. In Romania, the EU laws take precedence over national laws, except for the Romanian Constitution.<sup>17</sup> In Germany, in 2016, the Federal Constitutional Court held in particular that

in principle, the *precedence* of application of Union law before national law also applies to conflicting national *constitutional* law (...) and as a rule, in case of conflict, leads to the national law being inapplicable in the specific case.<sup>18</sup>

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<sup>15</sup> Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, (1999) 51 Stanford Law Review 529, 530 in David Sloss, *supra* 9.

<sup>16</sup> Declarations annexed to final act of the intergovernmental conference which adopted the Treaty of Lisbon, 26 October 2012, OJ C326/346, [17]. The principle was derived from the European Court of Justice case law in *Costa/ENEL*, 15 July 1964, Case 6/64.

<sup>17</sup> Viorica Viță, *supra* 10, 1655.

<sup>18</sup> German Federal Constitutional Court, OMT, *bverfg*, judgment of 21 June 2016, 2 bve 13/13, 2 bvr 2728/13, 2 bvr 2729/13, 2 bvr 2730/13, 2 bvr 2731/13, [118].

In Belgium, the Constitution effectively remains the highest norm, for limits have been set as to the application of the primacy principle.<sup>19</sup>

Disparities towards the acceptance level of the primacy principle must be seen against the background of the multilayered spectrum of human rights protection in the EU comprising of protection by national constitutions and by community-level conventions.<sup>20</sup> Given the sphere in which constitutional courts must guard the constitutions, Komárek<sup>21</sup> submitted three methods to balance the need of expanding constitutional democracy through European integration with that of maintaining the role of constitutional courts. First, the CJEU must end its practices of allowing national courts to safeguard the EU law which reduce the authority of constitutional courts.<sup>22</sup> Second, constitutional courts must refrain themselves from being significantly submissive to EU law, for that law is complementary, rather than interchangeable, to the national constitution.<sup>23</sup> Third, constitutional courts must refrain from being extremely resistant to EU law, for it could compromise the constitutional democracy throughout the EU.<sup>24</sup>

The international tax law does not recognize a supranational court like the CJEU. The primacy of the MLI can, therefore, only be tested against the constitutional values of each signatory state. With signatories reaching 84 states,<sup>25</sup> governments are incentivized to implement the MLI without due regard to the protection of taxpayers' rights. Constitutionality reviews of the MLI must, therefore, be able to effectuate the protection of basic rights while upholding the governments' constitutional mandate to administer tax affairs.

### **15.2.2 Identification of Potential Infringements on Basic Rights**

The above considerations presuppose the widest scope of constitutionality review. However, there exist a wide range of types of constitutionality review: from a concrete form which takes into account facts regarding infringements of basic rights to an abstract constitutionality review. The latter type of review is, however, not always available.

In any event, it is necessary for the constitutional court to perform a proportionality test between the norms formulated throughout the MLI, and the basic rights embedded in the constitution. The failure

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<sup>19</sup> Philippe Gerard and Willem Verrijdt, 'Belgian Constitutional Court adopts national identity discourse', (2017) 13 European Constitutional Review 182, 193.

<sup>20</sup> Aleksandra Kustra, 'The Polish Constitutional Tribunal and the Judicial Europeanization of the Constitution', (2015) 35 Polish Yearbook of International Law 193, 212-213.

<sup>21</sup> Jan Komárek, 'The place of constitutional courts in the EU', (2013) 9 European Constitutional Law Review 420, 449.

<sup>22</sup> Jan Komárek, *supra* 21, 449.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, 450.

<sup>25</sup> OECD, 'Signatories and parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Status as of 27 September 2018', [www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf](http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf) [22 November 2018].

of a state in fulfilling its budgetary functions often leads to investigation on tax avoidance and evasion allegedly committed by the taxpayers. In this regard, taxpayers have always been at the more vulnerable position in tax collection.

Taxpayers cannot always rely on a charter of taxpayer's rights. When a dispute arises, classic arguments such as 'safeguarding revenue' and 'the need of effective fiscal supervision' are often submitted by the governments as justification to any transgression of taxpayers' rights. Meanwhile, a procedure by which a national court communicates with its constitutional court regarding the constitutionality of a tax norm is not always available. Thus, taxpayers who complain that their basic rights have been violated are urged to file constitutional complaint.

While the right to property is of high relevance to tax matters, violations of other basic rights are not excluded. Depending on the scope of the right as established in the case law of the relevant constitutional courts, there may be other rights affected by the application of the MLI in a domestic legal system. For example, the MLI's hybrid mismatches rule, which allows states to re-characterize corporate structure for tax purposes, may hinder a person in pursuing his freedom of association. Also, depending on the provisions of the constitution, protection of basic rights may also be warranted for legal persons, which are relevant to corporate taxpayers.

#### ***15.2.2.1 Potential Infringements against the Right to Property***

The DTC and the MLI largely operate in respect of income tax collection, which upholds the 'fruit and tree' doctrine. This doctrine provides that the assets are the tree that generates the fruit, which is the income. One could argue that only the assets, and not the income, are considered property. The jurisprudence of the Canadian Tax Court in *Prévost* suggests, however, that:<sup>26</sup>

(...) It may well be ... that when the terms 'beneficial owner', 'beneficially owned' or 'beneficial ownership' are used in *the Act*, it is either used in conjunction with property ... but is never used in conjunction with the income which is derived from the property ... *However, dividends, whether coin or something else, are in and by themselves also property and are owned by someone.* (emphasis added)

The right to income is thus the right to property, the exercise of which is protected by the constitution.<sup>27</sup> Article 17 of the Charter of Fundamental Rights of the European Union determines the scope of the right as to include ownership, usage, disposal and bequeath of lawfully acquired possessions. The restrictions of the right are set by the law.<sup>28</sup> One can be deprived of property if it is for the public good and entails fair compensation.<sup>29</sup>

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<sup>26</sup> Tax Court of Canada, *Her Majesty the Queen v. Prévost Car Inc.* (2008TCC231), [99].

<sup>27</sup> See, e.g., the German Basic Law, Art. 14; the Charter of Fundamental Rights of the European Union, Art. 17; the Belgian Constitution, Art. 16; the Indonesian Constitution, Art. 28H(4).

<sup>28</sup> The German Basic Law, Art. 14(1).

<sup>29</sup> The German Basic Law, Art. 14(3); the Belgian Constitution, Art. 16; the Charter of Fundamental Rights of the European Union, Art. 17(1).

Potential infringements by the MLI on the right to property include provisions which entail requirements on the possession of income-deriving assets and limitations on the entitlement to double taxation relief. These include provisions on the subject-to-tax requirement for transparent entities (Art. 3(1)); on the absence of double taxation relief in the case of unresolved dual tax residence (Art. 4(1)) or different characterization of taxable income (Art. 5(1)); on the minimum holding period of dividend-entitling shares (Arts. 8(1) and 9(1)).

The above provisions effectively limit the fashion by which a taxpayer could own, use, dispose and bequeath their assets. In practice, these provisions might become more dominant than they should be. The 365-day holding period laid down in Articles 8(1) and 9(1) of the MLI, for example, could deter a person from utilizing its funds for short-term investments or to make other business-reasoned judgments. Here, a constitutional complaint could be well founded.

When a double taxation relief is rejected, a complaint might be objected to buy the argument that tax authorities are not constitutionally obliged to conclude DTC with all states in which taxpayers operate their businesses in order to eliminate double taxation suffered by those taxpayers. Nor do tax authorities have the obligation to eliminate it unilaterally under the domestic tax laws. Taxpayers may submit, however, that the absence of relief has resulted in excessive taxation.

The rejection of double taxation relief may be brought before the constitutional courts, if it resulted from unresolved conflicts of qualification (Arts. 3(1) and 5(1)) and dual-residence conflicts (Art. 4(1)). These conflicts have been addressed in the model DTC, specifically the OECD Model Convention (OECD MC), as well as in multiple reports issued by the OECD (e.g. the Partnership Report). While the rules laid down in these documents are not legally valid, they are of high practical significance in tax collection. While the above MLI provisions constitute a statutory limitation allowed by the constitution and consented to by the government, they may not represent the values of the people.

#### ***15.2.2.2 Potential Infringements on Equality***

The MLI is a culmination of the BEPS project. BEPS itself refers to the ‘tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity’.<sup>30</sup> The so-called ‘aggressive tax planning’ undermines

the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level [and undermines the] voluntary compliance by all taxpayers.<sup>31</sup>

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<sup>30</sup> OECD, ‘About the Inclusive Framework on BEPS: Background’, [www.oecd.org/tax/beps/beps-about.htm](http://www.oecd.org/tax/beps/beps-about.htm) [26 November 2018].

<sup>31</sup> OECD, *supra* 30.



Unequal treatment by the governments may result from the MLI provisions on tax abuse, including the Principal Purpose Test (PPT) rule (Art. 7(1) and (4)), the Simplified Limitation on Benefits (SLoB) Provision (Art. 7(8), (9), (10), (11), (12), and (13)) and the rules concerning avoidance of permanent establishment status (Arts. 10, 12-14). The PPT rule, for example, includes a phrase by which DTC benefits<sup>32</sup> may only be granted if

it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the *principal* purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.

In the absence of a statutory definition of ‘principal purpose’, tax authorities may arbitrarily apply different *de minimis* rules in qualifying abusive practices.

The tax authorities’ discretion to qualify and disqualify certain persons from DTC benefits are even made explicit in the SLoB Provision. While the requirements of persons qualifying for DTC benefits are restrictive as to set a minimum amount of share ownership (Art. 7(8) and (9) of the MLI), an unqualified person could, nonetheless, obtain DTC benefits by virtue of the rules laid down in the subsequent paragraphs (e.g. having an active conduct of business). Most strikingly, Article 7(12) of the MLI confers that such person could obtain DTC benefits if it

*demonstrates to the satisfaction of [the tax] authority* that neither its establishment, acquisition or maintenance, nor the conduct of its operations, had as one of its principal purposes the obtaining of [DTC] benefits.

Furthermore, the tax authorities’ freedom to curtail provisions in the MLI also leads to arbitrariness. The MLI rule on the avoidance of permanent establishment status effectively determines persons that may or may not be granted with DTC benefits, and can be decided jointly by different tax authorities (Art. 10(3) of the MLI).

Discriminatory tax treatment has found justification on the grounds of residency of the taxpayers (i.e. a non-resident could be treated differently than a resident) and of the need to establish effective fiscal supervision (e.g. a non-resident could be denied of net calculation of income that is available for a resident). It is also not difficult to accept that tax laws should limit the possibility of taxpayers to conduct abusive tax practices. The potential breach of equality<sup>33</sup> arises, however, from the tax authorities’ discretion to determine the consequences of arrangements made by the taxpayers. This is not to mention that, in counterbalancing the exemption made by one state, a state may be re-allocated

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<sup>32</sup> A DTC confers benefits by which income distributed from one of the contracting jurisdiction to the other contracting jurisdiction may, provided that the conditions are met, enjoy preferential withholding tax rates, which are lower than the rates that would otherwise be applicable under domestic tax laws of the state in which the income is sourced. Also, the state in which the recipient resides would, under the DTC provisions on elimination of double taxation, exempt or grant relief of the taxes paid in the source state.

<sup>33</sup> For references on equality, *see*: the German Basic Law, Art. 3(1); the Belgian Constitution, Art. 10; the Charter of Fundamental Rights of the European Union, Art. 20.

with taxing rights it previously surrendered when concluding DTC with its partner states (Art. 11 of the MLI).

### **15.2.3 Establishing an Effective Constitutionality Review of the (Ratified) MLI**

The above considerations set up the grounds for a potential constitutional review of the MLI. In order to effectuate the review, engagement in judicial dialogues must be performed. Institutionally, this review is best performed by an independent judicial body with mandate to review the constitutionality of the laws.

Historically, the 1937 Irish Constitution is claimed to be the first constitution prescribing the mandate to review the constitutionality of the laws, when common law states such as the United Kingdom, Australia and Canada did not.<sup>34</sup> In Germany<sup>35</sup> and Belgium,<sup>36</sup> the mandate is prescribed for the Constitutional Court. In the United Kingdom, the tasks to interpret and implement, as to glean a sense of existence of, the constitution are performed by the U.K. Supreme Court; the mandate is not prescribed in the constitution, nor is it reserved for a certain judiciary power.<sup>37</sup> Meanwhile, in Ethiopia, the mandate is prescribed within the constitution; but instead for the state's judiciary power, it is prescribed for the House of Federation.<sup>38</sup>

### **15.3 Balancing the Competing Interests within the (Ratified) MLI**

The MLI represents a coordinated, if not a harmonized, effort. Specifically, the MLI has adopted 'weak' harmonization whereby norms are harmonized to the extent that states retain their rights to opt out on some of the provisions, and to legislate around the harmonized norms.<sup>39</sup> This typology is accurate in describing the vagueness of the MLI provisions, which need further definition.<sup>40</sup>

Meanwhile, as a product of intergovernmental cooperation, it goes without saying that the MLI pays little or no regard to the interests of the taxpayers. The paradigm upheld in formulating the MLI is completely different than that in formulating a DTC. Theoretically, a DTC is formulated in line with the traditional pluralist approach by which socio-economic interests of the people influence the

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<sup>34</sup> The Supreme Court of Ireland, *A v Governor of Arbour Hill Prison* [2006] 4 I.R. 88, 145-146. See also: Paul Gallagher, 'The Irish Constitution – its unique nature and the relevance of international jurisprudence' (2010) 45 Irish Jurist 22, 30.

<sup>35</sup> The German Basic Law, Art. 93(1), The Act on the Federal Constitutional Court of § 13(6).

<sup>36</sup> The Belgian Special Act of 6 January 1989 on the Constitutional Court.

<sup>37</sup> Jo Eric Khushal Murkens, 'Judicious review: the constitutional practice of the UK Supreme Court', (2018) 77 Cambridge Law Journal 349, 349.

<sup>38</sup> The Ethiopian Constitution, Art. 61. See also: K.I. Vibhute, 'Non-judicial review in Ethiopia: constitutional paradigm, premise and precinct', (2014) 22 African Journal of International and Comparative Law 120.

<sup>39</sup> Mark Humphery-Jenner, 'The desirability of 'weak' form of legal harmonization: perspective from statutory interpretation and legal coherence', (2012) 13 German Law Journal 807, 807.

<sup>40</sup> Mark Humphery-Jenner, *supra* 39, 807.

governments' decision-making process, although the decision resulted therefrom must somehow reflect the latter's independence from the former.<sup>41</sup>

Representation of different interest groups is evident within the provisions of the DTC. Its model affirms states' commitment in avoiding double taxation on cross-border income accumulated by, inter alia, entrepreneurs, employees, pensioners, artists, sportsmen and professors. States also ensure that their taxpayers do not suffer from double taxation (Art. 23 of the OECD MC) and from discriminatory tax treatment (Art. 24 of the OECD MC). These characteristics cease to exist within the MLI and BEPS project.

Without any deliberate protection expressed by their governments, taxpayers are vulnerable to abuse of basic rights. This means that a constitutionality review by an independent judicial body is necessary to balance the competing interests, although as a normative concept, balancing of competing interests requires normative judgment of various incommensurable values.<sup>42</sup>

The plea for balancing becomes urgent, because the MLI, entered into force on 1 July 2018,<sup>43</sup> is currently at a time in which states are contemplating on the methods by which their acceptance of the obligations arising from ratifying the instrument will be realized. This implies that breach of basic rights may soon be identified. Methodically, the act of balancing requires certain logical steps, namely: (a) ascribing a value to the interests in concern; (b) determining whether interests may be 'traded off' pursuant to achieving other goals; (c) should the interests be tradable, deciding whether the intrusion against the superior interest is proportionate, considering the 'stringency' of the infringed interests: the more valuable the interests, the more stringent the test.<sup>44</sup>

When balancing the competing interests within the (ratified) MLI, the courts' openness to sound legal principles could turn out to be beneficial. The principle of ability to pay, for example, may be allocated with some weight when determining the existence of breach against the right to property. Other established legal principles include the freedom of contract, legal certainty and balanced allocation of taxing rights. Established rules and doctrines (e.g. the business judgment rule, the ultra vires doctrine) may also be referred to.

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<sup>41</sup> David Johson, 'The Canadian regulatory system and corporatism: empirical findings and analytical implications', (1993) 8 Canadian Journal of Law and Society 95, 98.

<sup>42</sup> Niels Petersen, 'How to compare the length of lines to the weight of stones: balancing and the resolution of value conflicts in constitutional law', (2013) 14 German Law Journal, 1387, 1392.

<sup>43</sup> OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Information brochure*, [www.oecd.org/tax/treaties/multilateral-instrument-BEPS-tax-treaty-information-brochure.pdf](http://www.oecd.org/tax/treaties/multilateral-instrument-BEPS-tax-treaty-information-brochure.pdf), [27 November 2018].

<sup>44</sup> Amir Attaran, 'A wobbly balance? A comparison of proportionality testing in Canada, the United States, the European Union, and the World Trade Organization', (2007) 56 University of New Brunswick Law Journal 260, 261-262.

The act of balancing is essential to a constitutionality review. In practice, courts attempt to reconcile two conflicting interests by classifying them into a hierarchy.<sup>45</sup> It stems from the principle of proportionality, by which the means adopted must be rational and the least restrictive in attaining the objective.<sup>46</sup>

An effective balancing on the competing interests within the (ratified) MLI could be achieved in two ways. First, the scope of a basic right could be narrowed or expanded as to exclude or include the MLI provision on which the constitutionality tests are applied. This is achieved when the constitutionality review is performed as an integral part of a constitutional complaint. If a certain MLI norm is found to be in breach of the right to property, then the scope of protection of that right has been enlarged; vice versa, if it is found to be constitutional, then the scope has been restricted.

The method in achieving the above result is definitional balancing, which aims at protecting the predictability and legitimate expectations by establishing categorical argumentative forms.<sup>47</sup> The method also aims to define the abstract scope of individual right; thus, not only does it examine the factual circumstances of each individual case but also establishes exceptions against the categorical scope of individual rights.<sup>48</sup> The method is also able to create rules for their addressees.<sup>49</sup> Using this method, constitutionality of the MLI can initially be tested through constitutional complaint in order to establish whether a certain MLI provision has actually breached one's basic rights. Reasoning found in the complaint could then undergo generalization in order to expand or narrow the scope of protection of the basic right in concern. For example, an MLI provision that has proven to have breached one's right to property could be included within the scope of protection of the right to property, thus annulling the domestic law embedding the provision.

Second, when constitutionality review is performed against the hypothetical outcome of a certain norm within the MLI, then the constitutional court may declare that norm to be valid or invalid, partly or in its entirety. Whichever is the outcome, it should be considered as reflecting the legal culture and values of a state.

## 15.4 Engaging in Judicial Dialogues

When performing the act of balancing between the competing interests within the MLI, constitutional courts or other independent body mandated with the task to review constitutionality of the law are

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<sup>45</sup> *Ibid.*, 261. Pietersen argues that balancing actually prevents the creation of fictitious hierarchy amongst different values, but simply allocates specific weight to each value.

<sup>46</sup> *Ibid.*

<sup>47</sup> Niels Petersen, *supra* 42, 1403.

<sup>48</sup> Niels Petersen, *supra* 42, 1401.

<sup>49</sup> Jochen von Bernstorff, *Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert kategorialer Argumentationsformen*, in Niels Petersen, *supra* 47, 1403.

expected to rule on the constitutionality or unconstitutionality of the instrument, and when proper, to engage in a judicial dialogue. The dialogue refers to the cross-referencing [of reasoning or decision] between national or supranational courts, particularly with regard to common substantive mission (e.g. protection of human rights).<sup>50</sup> Typically, a dialogue takes place between national courts with comparable status, such as constitutional courts (horizontal communication) or between national and supranational courts in the context of an international framework (vertical communication). It could also be a combination of both.<sup>51</sup>

The engagement by constitutional courts in horizontal communications in respect of the MLI is necessary in order to determine and promote the reciprocal obligations arising from the instrument.<sup>52</sup> While reciprocal obligations are better formulated strict-harmonizing<sup>53</sup> (e.g. EU law), a national court can, nonetheless, reassure itself that its decision will not worsen off the people and government of its state, relative to other states.<sup>54</sup> Additionally, a judicial dialogue may serve as a ‘cross-fertilization’ process by which solutions to legal problems are collectively worked for.<sup>55</sup> This is attained when a disseminating court casts its legal rules or principles, which are then caught by a listening court.<sup>56</sup> For example, if an MLI provision is found to be unconstitutional in one court, then that state could disseminate its findings (e.g. through publications or conferences) in order for other courts to respond or unforcedly embeds those findings in their respective cases.

Although the method is only persuasive, it has been extensively used in practice. According to Harding,<sup>57</sup> comparative legal reasoning by way of citation of foreign laws has formed an integral part of the Canadian Supreme Court, to an extent where the descriptions on the use, relevance and value towards its jurisprudence are hardly visible. At some point, the amount of foreign law citation had even exceeded that of Canadian own jurisprudence.<sup>58</sup> The Court, however, restricted its ascription to foreign cases as to merely providing ‘statements of principles’ from which a unique and genuine Canadian approach and solution will be shaped.<sup>59</sup>

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<sup>50</sup> Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’, (1994-1995) 29 *University of Richmond Law Review* 99, 101-102.

<sup>51</sup> Anne-Marie Slaughter, *supra* 50, 103, 106, & 111.

<sup>52</sup> Anne-Marie Slaughter, *supra* 50, 116.

<sup>53</sup> A strict harmonization refers to the regime “[...] which limits the ability of member states to opt out of particular provisions, strictly defines technical terms (so that member states do not define them), and in the extreme, would have a centralized regulatory regime”. *See*: Mark Humphery-Jenner, *supra* 39, 808.

<sup>54</sup> Anne-Marie Slaughter, *supra* 50, 116.

<sup>55</sup> *Ibid.*, 117.

<sup>56</sup> *Ibid.*, 118.

<sup>57</sup> Sarah K. Harding, ‘Comparative reasoning and judicial review’, (2003) 28 *Yale Journal of International Law* 409, 413. *See also*: Anne-Marie Slaughter, *supra* 50, 124.

<sup>58</sup> Sarah K. Harding, *supra* 57, 416.

<sup>59</sup> *Ibid.*, 417.

Within the vast array of dialogues which take place between courts around the world, future judicial dialogues on the constitutionality of the (ratified) MLI are highly probable. Legal systems are stringent to their own culture; and a culture is absorbent to other cultures.<sup>60</sup> Supposedly, the legal systems are also porous to each other. Contextually, the openness of the MLI to constitutionality reviews will ultimately draw a level playing field between the governments and the taxpayers.

Future judicial dialogues on the subject matter are also important in harnessing the link between constitutional law and tax law. A harnessed relationship between the two branches of law supposes that the former lays down sound principles that would enable the latter to acquire its robustness. It should be kept in mind that although the MLI is radical in terms of deconstructing the existing balanced allocation of taxing rights, this instrument has yet to build solid foundations.<sup>61</sup>

## 15.5 Conclusions

In the light of the above considerations and in order to answer the question of this paper, an effective constitutionality review on the new international tax order initially presupposes the existence of an independent state (judicial) body which can perform an objective review on the constitutionality of the (ratified) MLI in that state. As for the governments, a review by another branch of state power may enhance their authority and legitimacy when implementing the MLI norms in the process of domestic tax collections. For the taxpayers, an effective constitutional review will settle their doubts on the effect of MLI norms to their basic rights.

Instead of being prescriptive, this chapter has been discursive. It addresses one of the major counteractive international tax measures formulated after the leaks of multiple tax avoidance and evasion practices which had taken place within the last decade. In addition to the MLI, the perpetual fight against abusive tax practices has recently sought for proposals, most prominently, that of the EU and the United Kingdom, concerning the Digital Services Tax. Prima facie, the stake for this regime to be reviewed for its constitutionality is higher than that of the MLI, for it prescriptively imposes additional direct taxes to certain categories of taxpayers. The latter could potentially lead to discrimination and ultra vires taxes issues. Amidst the growing tension between the governments and the taxpayers, constitutional courts may find themselves as the necessary arbiter with a significant role in fostering the constitutional values vis-à-vis the administration of taxes.

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<sup>60</sup> *Ibid.*, 411.

<sup>61</sup> Michael P. Devereux and John Vella, 'Are we heading towards a corporate tax system fit for the 21st century?' cesifo DICE Report, ISSN 1613-6373, ifo Institut – Leibniz-Institut für Wirtschaftsforschung an der Universität München, München, Vol. 12(4), 3.